

Exhibit 1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PROTECTMARRIAGE.COM, et al., No. 2:09-cv-00058-MCE-DAD
Plaintiffs,
v. MEMORANDUM AND ORDER
DEBRA BOWEN, et al.,
Defendants.

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Plaintiffs, each California committees established to support the passage of Proposition 8, which amended the California Constitution to define marriage as existing only between a man and a woman, filed the current action challenging California's statutory requirement that they disclose the names and other personal information of their contributors. Presently before the Court is the State Defendants' Motion Under Federal Rule of Civil Procedure 56(f) to Deny Plaintiffs' Motion for Summary Judgment or, in the alternative, to Continue the Hearing Date of Plaintiffs' Motion ("Rule 56(f) Motion"). For the following reasons, State Defendants' Motion is granted.

BACKGROUND

Plaintiffs initiated this action on January 7, 2009, and subsequently moved for a preliminary injunction, which this Court denied. On May 18, 2009, the Court issued a Pretrial Scheduling Order ("PTSO") ordering discovery to be completed not later than May 14, 2010, disclosure of expert witnesses to occur not later than July 14, 2010, and all dispositive motions to be heard not later than September 16, 2010.

On June 3, 2009, Plaintiffs filed a Motion for Summary Judgment ("MSJ"), which bears striking similarity to their original preliminary injunction motion and argues that California's compelled disclosure requirements are unconstitutional both facially and as-applied. State Defendants responded on June 5, 2009, by filing the instant Rule 56(f) Motion, and the Court granted their simultaneous request to hear that Motion on shortened time. The Department of Elections for the City and County of San Francisco, as well as Dennis J. Herrera, the City Attorney for the City and County of San Francisco, subsequently joined in the Motion. Defendant Dean C. Logan, Los Angeles County Registrar-Recorder/County Clerk, filed a statement taking no position on the instant Motion, and Defendant Jan Scully filed a Statement of Non-Opposition.

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Federal Rule of Civil Procedure 56(a) permits a party to file a Motion for Summary Judgment "any time after: (1) 20 days have passed from commencement of the action; or (2) the opposing party serves a motion for summary judgment." Nevertheless, pursuant to Rule 56(f):

"Federal Rule of Civil Procedure 56(f) provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence.'" Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck, 323 F.3d 767, 773 (9th Cir. 2003), quoting United States v. Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002). "The cases construing Rule 56(f) suggest that the denial of a Rule 56(f) application is generally disfavored where the party opposing summary judgment makes (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists. Summary denial is especially inappropriate where the material sought is also the subject of outstanding discovery requests." VISA Intern. Service Ass'n v. Bankcard Holders of America, 784 F.2d 1472, 1475 (9th Cir. 1986).

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1 "Where...a summary judgment motion is filed so early in the
2 litigation, before a party has had any realistic opportunity to
3 pursue discovery relating to its theory of the case, district
4 courts should grant any Rule 56(f) motion fairly freely."
5 Burlington Northern, 323 F.3d at 773.

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7 **ANALYSIS**
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9 By way of their instant Rule 56(f) Motion, Defendants argue
10 it is impossible to adequately oppose Plaintiffs' previously
11 filed MSJ without the aid of further discovery. Defendants make
12 several arguments, reiterated here, in support of their position.

13 Defendants first contend that "it will be necessary for the
14 State Defendants to obtain and review each of the ballot-committee
15 Plaintiffs' semi-annual campaign statements in order to support
16 their factual representations and arguments in opposition to
17 Plaintiffs' Motion." Rule 56(f) Motion, 4:15-18. According to
18 Defendants, "[b]ecause these campaign reports will cover a crucial
19 period during which Plaintiffs allege reprisals have continued,
20 the State Defendants believe that such information will be
21 essential to their ability to demonstrate the actual impact, if
22 any, the alleged reprisals have had on Plaintiffs' ability to
23 raise funds and broadcast their message - an issue central to the
24 State Defendants' opposition." Id., 4:21-25. Those reports are
25 to be filed not later than July 31, 2009.

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1 Thus, Defendants argue that "[a]bsent a denial or continuance of
2 Plaintiffs' motion, the State Defendants will not have sufficient
3 time to obtain, review, and analyze these reports; reports the
4 Plaintiff [sic] themselves allege may exceed 2,800 pages." Id.,
5 4:27-5:2. "State Defendants believe it will take their experts
6 no less than four (4) months after the campaign reports are filed
7 to analyze and compile the information contained in the reports
8 in a manner sufficient to enable them to compare the
9 contributions and expenditures from this period with those
10 covering prior periods." Id., 3-6.

11 Likewise, Defendants claim they also "need to consult experts
12 in order to address Plaintiffs' contentions regarding the impact
13 of modern technology on the ability of ballot committees to
14 successfully engage in fundraising. The question as to whether
15 ballot measure contributions have been increasing throughout the
16 Internet era, rather than decreasing as Plaintiffs' claims would
17 suggest, is essential to the State Defendants' arguments in
18 opposition to Plaintiffs' motion." Id., 5:8-13.

19 Lastly, Defendants allege they "will need to consult experts
20 regarding the State's interest in public disclosure of ballot-
21 committee contributor identity, including relatively small
22 donors, and the injury to the State's electoral process if
23 disclosure is withheld whenever a ballot measure election
24 generates controversy. Experts will also need to be consulted
25 regarding 'normal' levels of heated debate, discourse, petty
26 vandalism, and boycotts during ballot measure elections, and
27 whether such activity results in any measurable chilled speech."
28 Id., 14-20.

1 Plaintiffs disagree with each of Defendants' assertions and
2 contend that Defendants are unable to seek refuge under
3 Rule 56(f) because they have not timely sought the necessary
4 discovery. Plaintiffs next assert that the discovery Defendants
5 intend to seek is irrelevant. Additionally, Plaintiffs' claim
6 that, because critical First Amendment rights are at stake, time
7 is of the essence. Finally, Plaintiffs argue that Defendants
8 failed to point to any evidence they intend to pursue in order to
9 challenge Plaintiffs' claims regarding post-election disclosure.
10 Each of these arguments is rejected.

11 Plaintiffs first contend that Defendants' Rule 56(f) Motion
12 should be denied because Defendants have failed to actively and
13 diligently pursue discovery. Specifically, Plaintiffs allege
14 Defendants have failed to serve any discovery requests at all.
15 Plaintiffs also claim that Defendants' objections to the form of
16 Plaintiffs' currently submitted evidence, as well as Defendants'
17 failure to raise those objections sooner, evidences the sort of
18 delay justifying denial of Defendants' instant Rule 56(f) Motion.
19 Finally, Plaintiffs argue that, in the originally filed Joint
20 Status Report ("JSR") Defendants agreed to an October 1, 2009,
21 discovery deadline, so Defendants should now be estopped from
22 delaying hearing on Plaintiffs' MSJ.

23 As a threshold matter, Plaintiffs' arguments ignore the fact
24 that this Court ordered all non-expert discovery to be completed
25 not later than May 14, 2010. Accordingly, the discovery period
26 is to remain open for approximately one (1) more year, and any
27 contrary date originally agreed upon by the parties is irrelevant
28 and must be disregarded.

1 Additionally, much of the discovery Defendants await will
2 not derive directly from Plaintiffs. For example, Defendants
3 anticipate reliance on public reports that, as of yet, do not
4 exist. Defendants further contend they need to consult their own
5 experts in analyzing those documents. Thus, at this early stage
6 in litigation, the Court will not fault Defendants for
7 hypothetical delays based solely on Plaintiffs' assertions that
8 they have yet to receive discovery requests.

9 Plaintiffs' relevancy arguments are similarly rejected.
10 Plaintiffs contend that the evidence Defendants seek is
11 unnecessary to Defendants' anticipated Opposition. According to
12 Plaintiffs, "the reasonable-probability test does not require
13 that there be an impact on the ability to raise funds and 'get
14 out the message' before an exemption is warranted," and "the
15 cause of harassment is irrelevant provided that it resulted from
16 the individuals support of Proposition 8 or a traditional
17 definition of marriage." Plaintiffs' Opposition to Rule 56(f)
18 Motion ("Opposition"), 10:8-10; 11:23-24.

19 However, "'[r]elevant evidence' means evidence having any
20 tendency to make the existence of any fact that is of consequence
21 to the determination of the action more probable or less probable
22 than it would be without the evidence." Fed. R. Evid. 401.
23 Evidence irrelevant for one purpose may, nonetheless, be relevant
24 for another, and this Court finds the evidence Defendants seek to
25 be potentially relevant to Plaintiffs' claims regarding the
26 chilling effect that compelled disclosure may have on that
27 political speech.

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1 Thus, the Court is satisfied that, even assuming Plaintiffs are
2 correct in their above assertions, Defendants' sought-after
3 evidence is relevant to their other potential arguments.

4 Next, Plaintiffs assert that "[a] continuance is unwarranted
5 because the First Amendment does not permit a 'shoot first, ask
6 questions later' approach." Opposition, 13:6-7. Plaintiffs rely
7 on the well-established principle that "[t]he loss of First
8 Amendment freedoms, even for minimal periods of time,
9 constitute[s] irreparable injury.'" Id., 14:8-10, quoting
10 Elrod v. Burns, 427 U.S. 347, 373 (1976). However, the Court has
11 already addressed this argument by way of Plaintiffs' Motion for
12 Preliminary Injunction. While the potential loss of First
13 Amendment rights clearly constitutes irreparable injury, the
14 Court denied that Motion on the basis that Plaintiffs' likelihood
15 of success on the merits, and consequently the likelihood of any
16 actual impairment of Plaintiffs' First Amendment rights, was
17 minimal. Accordingly, because the Court previously weighted and
18 rejected Plaintiffs' instant argument, it will not reconsider it
19 here.

20 Finally, Plaintiffs argue that "Defendants have not
21 presented an argument as to why summary judgment should not
22 proceed with respect to the issues of post-election reporting and
23 the continued public availability of reports after a ballot
24 measure election has occurred." Opposition, 14:15-16. The Court
25 declines Plaintiffs' request to bifurcate the causes of action
26 before it.

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1 Each of Plaintiffs' causes of action is related to the others,
2 and the Court finds Defendants' anticipated discovery likely to
3 be relevant to the State's interest in post-election disclosure
4 to the same extent it may be relevant to the same disclosure pre-
5 election. Consequently, Plaintiffs' argument to the contrary is
6 rejected.

7 Plaintiffs conclude by requesting that, as an alternative to
8 denying Defendants Rule 56(f) Motion, the Court orders
9 Plaintiffs' MSJ to be heard not later than November 19, 2009.

10 Plaintiffs premise this request on the dispositive motion
11 deadline originally agreed to by the parties in their JSR.

12 However, to reiterate, the JSR is not the controlling
13 document in this case for scheduling purposes. On May 18, 2009,
14 this Court issued its PTSO, and it is the PTSO that governs the
15 scheduling of this case. Indeed, Plaintiffs' instant request
16 would require the Court to amend the PTSO to modify, at least in
17 part, the deadline for hearing dispositive Motions.

18 Nevertheless, Plaintiffs failed to timely object to the PTSO.

19 See PTSO, 12:2-4 ("This Status Order will become final without
20 further order of the Court unless objections are filed within
21 seven (7) court days of the date this Order is electronically
22 filed."). Moreover, though the Court may choose to modify the
23 PTSO upon a showing of good cause, Plaintiffs have wholly failed
24 to show such cause exists here. Fed. R. Civ. Proc. 16(b); see
25 also Johnson v. Mammoth Recreations, 975 F.2d 604, 608 (9th Cir.
26 1992). Thus, Plaintiffs' request is denied.

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1 This case was filed approximately six months ago and is
2 still in its infancy. With almost one (1) year left prior to the
3 Court-ordered discovery cut-off, this Court is not inclined to
4 force the parties to an immediate judgment or to force Defendants
5 to expose their litigation strategy to avoid doing so. Indeed,
6 it would arguably be irresponsible for the Court to prematurely
7 permit the parties to pursue a final determination on the merits
8 of the instant controversy without a fully developed record. The
9 Court is satisfied that Defendants are diligently seeking the
10 necessary discovery and that such discovery is relevant to their
11 Opposition to Plaintiffs' MSJ. Accordingly, Defendants'
12 Rule 56(f) Motion is hereby granted, and Plaintiffs' MSJ is
13 denied without prejudice.

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15 **CONCLUSION**
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17 Defendants' Motion Under Rule 56(f) (Docket No. 171) is
18 GRANTED.¹ Plaintiffs' Motion for Summary Judgment (Docket
19 No. 110) is DENIED without prejudice.

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27 ¹ Because oral argument will not be of material assistance,
28 the Court ordered this matter submitted on the briefing. E.D.
Cal. Local Rule 78-230(h).

1 Prior to the close of non-expert discovery, which at this time is
2 scheduled to terminate not later than May 14, 2010, no party
3 shall file any Motion for Summary Judgment without leave of this
4 Court.

5 IT IS SO ORDERED.

6 Dated: June 23, 2009
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9 MORRISON C. ENGLAND, JR.
10 UNITED STATES DISTRICT JUDGE
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